

AUG 27 1997

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
800 Data Base Access Tariffs and the 800	)	CC Docket No. 93-129
Service Management System Tariff	)	
	)	
and	)	
	)	
Provision of 800 Services	)	CC Docket No. 86-10

**REPLY OF U S WEST COMMUNICATIONS, INC.  
TO OPPOSITION TO APPLICATION FOR REVIEW**

U S WEST Communications, Inc. ("U S WEST") submits this Reply to the Opposition ("Opposition") of AT&T Corp. ("AT&T") to U S WEST's Application for Review ("Application") of the Refund Order issued by the Common Carrier Bureau ("Bureau") in this proceeding.<sup>1</sup>

AT&T's Opposition does a remarkable job of responding to a number of arguments that U S WEST did not make, virtually ignoring the arguments that U S WEST did make. The reasons for AT&T's approach will become obvious.

In its Application, U S WEST raised two arguments supporting its position that the Federal Communications Commission ("Commission") should reverse the Bureau's refusal to reduce U S WEST's refund liability to reflect amounts

<sup>1</sup> In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, Memorandum Opinion and Order, DA 97-1336, rel. June 26, 1997 ("Refund Order"). U S WEST's Application for Review, filed July 28, 1997. AT&T's Opposition filed Aug. 12, 1997.

U S WEST had refunded to customers via the sharing mechanism in 1993 and 1996. Both arguments flow from a single phenomenon: every dollar of revenue generated by the costs the Commission disallowed in the Report and Order<sup>2</sup> produced a dollar of sharing liability in 1996 and fifty cents of sharing liability in 1993. Based on this fact, which even the Refund Order acknowledged,<sup>3</sup> U S WEST argued that disregarding the amounts already refunded via sharing would require U S WEST to refund the same amounts twice.

U S WEST further argued, as to 1996 only, that the Commission's failure to complete its investigation of the rates at issue within the time limit then prescribed by the Communications Act had prejudiced U S WEST. If the Commission had met its statutory obligation, U S WEST's Price Cap Indices ("PCI") would have been adjusted in 1994 in the same fashion that the Commission ordered in late 1996. That adjustment would obviously have eliminated the need for any refunds with respect to 1996. But that adjustment would also have reduced U S WEST's earnings -- and thus its sharing obligation -- in 1996. Thus, because the Commission failed to complete its investigation within the time period mandated by Congress, U S WEST incurred an increased sharing obligation in 1996 -- an obligation that bears a direct, dollar-for-dollar relationship to the revenues derived from the subsequently-disallowed costs. Now, the Refund Order would require U S WEST to refund these same amounts a second time. The Commission's

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<sup>2</sup> In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, Report and Order, 11 FCC Rcd. 15227 (1996).

inaction thus has plainly prejudiced U S WEST, and it cannot now order refunds with respect to 1996.

AT&T never directly addresses U S WEST's arguments. Thus, says AT&T:

[A] [local exchange carrier] LEC's sharing obligation does not mean that [the] LEC . . . has made a refund to its customers for any overstated PCI. To the contrary, because the price cap plan stresses LEC overall productivity, the sharing obligation is measured by total interstate earnings and thus can be triggered even if the LEC does not exceed its PCIs for any of the measured services.<sup>4</sup>

AT&T has it exactly backwards. U S WEST did not claim that the presence of a sharing obligation necessarily indicates that a LEC has exceeded its PCIs. But U S WEST's overstated PCI undeniably increased its sharing obligation. And if U S WEST is required to refund the overcharges and make a sharing refund, it has refunded the same amounts twice.

Moreover, AT&T tells us --

to the extent that a sharing obligation was triggered for U S WEST, the direct link to its 800 data base revenues is tenuous at best. In fact, U S WEST did not demonstrate . . . that any sharing obligation resulted from its 800 data base rates or any particular rate element.<sup>5</sup>

Totally true; utterly irrelevant. The Commission did not order U S WEST to refund any portion of its 800 data base revenues "or any particular rate element." In the Report and Order, the Commission ordered U S WEST to adjust its PCIs and, if necessary, reduce rates to bring its API back to the level of the adjusted PCI. U S WEST adjusted its PCI and brought its API back within limits by reducing its

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<sup>3</sup> Refund Order ¶ 17.

<sup>4</sup> Opposition at 4-5, emphasis in original, footnotes omitted.

<sup>5</sup> Id. at 5.

rate for local switching; its rates for 800 data base service have not changed. The Commission subsequently ordered U S WEST to make refunds, but those refunds are again measured by the difference between its PCI and API in any given year.<sup>6</sup> In short, this proceeding is not about "any particular rate element," and never has been. It concerns U S WEST's PCI and the relationship between that PCI and its API. That U S WEST cannot attribute its increased sharing obligation to "any particular rate element" is irrelevant.

What U S WEST has demonstrated is that its overstated PCI increased its sharing obligation. If U S WEST's PCI had been at the level the Commission subsequently found appropriate, U S WEST would not have collected the revenues that now constitute the refund. U S WEST would also not have returned those revenues to carriers through the sharing mechanism -- dollar for dollar in 1996, and fifty cents on the dollar in 1993. Nothing in AT&T's Opposition rebuts, or even challenges, that fundamental truth.

AT&T challenges U S WEST's argument that, having allowed a "headroom offset" (as AT&T characterizes it), the Commission should also allow a sharing offset. Thus, says AT&T, "if U S WEST is entitled to one offset, it cannot logically be entitled to the other."<sup>7</sup> There was, of course, no "headroom offset." Rather, the

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<sup>6</sup> Refund Order ¶¶ 11-13.

<sup>7</sup> Opposition at 8, n.18. AT&T also rebuts a supposed argument that the Refund Order is inconsistent with Section 204 of the Act "by virtue of the 42 month delay in deciding the rate investigation." (Id. at 8.) AT&T has confused two separate arguments here. U S WEST merely noted that Section 204 requires a carrier to refund only the portion of charges found to be unlawful. Because the Refund Order has the effect of requiring U S WEST to refund that "portion" twice, we believe it is

Bureau correctly determined to measure the LECs' refund liability as the amount by which their APIs exceeded their revised PCIs in any year. That is not an "offset" to an otherwise-measured liability.

Moreover, though it claims that U S WEST "cannot logically be entitled" to a sharing offset if it receives a headroom "offset," AT&T makes no cogent argument to support that claim. AT&T states:

The headroom offset is based on U S WEST not overcharging its customers, because it priced its service below the Price Cap Index. The offset thus represents the amount U S WEST did not charge and collect from its customers. The sharing obligation, on the other hand, arises from actual overearnings based on the amounts actually charged and collected from customers. Because the sharing obligation arises from actual overearnings, the Bureau's Refund Order properly denied an offset for sharing.<sup>8</sup>

AT&T has posed a non sequiter. Though this statement may accurately describe the headroom and sharing "offsets" in some vague sense, the stated conclusion does not follow.

The argument AT&T is attempting to respond to here was somewhat less convoluted than AT&T's response would indicate. In the Refund Order, the Bureau properly allowed the LECs to measure their refund liability in any year as the amount by which their APIs exceeded their recalculated PCIs. As U S WEST noted, the Bureau thus acknowledged the practical realities of price caps. We simply argued that the Bureau acted inconsistently in disregarding the effects of sharing,

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inconsistent with Section 204. U S WEST made a separate argument regarding the Commission's failure to complete its investigation within the statutory time limit. We discuss that infra.

<sup>8</sup> Opposition at 8, n.18 (emphasis in original).

another practical reality of the price cap regime. That one effect arises from undercharging customers, while the other results from overearnings, does not justify ignoring the latter. At the very least, AT&T has not provided any reason for doing so.

AT&T chides U S WEST for misstating the principle of FPC v. Tennessee Gas Co.,<sup>9</sup> the case principally relied on by the Bureau in rejecting a sharing offset. U S WEST stated that the principle of that case “is simply that a utility may not recoup undercharges to one set of customers by overcharging another group of customers.”<sup>10</sup> To be sure, there was much more to FPC v. Tennessee Gas Co. than that simple proposition, but it is unquestionably at the heart of the ruling:

[A] rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company’s losses in the first instance do not justify its illegal gain in the latter.<sup>11</sup>

This is the risk that Tennessee Gas “shouldered” when it filed its rate case. The risk arose from the fact that the Federal Power Commission (“FPC”) would allocate its costs among the company’s six rate zones. The current proceeding presents nothing comparable to that.

The point, though, is that nothing in FPC v. Tennessee Gas Co. obliges a regulated company to bear the risk of twice refunding the same amounts to the

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<sup>9</sup> Federal Power Com’n v. Tenn. Gas Transmission Co., 371 U.S. 145 (1962).

<sup>10</sup> Application at 8.

<sup>11</sup> FPC v. Tennessee Gas Co., 371 U.S. at 152-53.

same customers. The case is fundamentally irrelevant to resolving the issue of a sharing offset, and the Bureau erred in relying on it.

Finally, AT&T makes little effort to rebut U S WEST's argument that the Commission's failure to conclude its investigation within the statutory deadline prejudiced U S WEST by exposing it to both refunds and a sharing obligation for 1996. Thus AT&T states --

U S WEST has offered no argument or evidence to show that the Bureau's consideration of [these] two actions would have resulted in a different result if a decision had been released sooner.<sup>12</sup>

AT&T is correct. Indeed, if the Commission had met its statutory obligation, the Bureau would not have had the "two actions" to consider for 1996. And that, of course, is the very point of the argument. If the Commission had completed its investigation in a timely fashion, the matter would have been resolved long before the 1996 rates took effect. In that case, U S WEST's 1996 rates would not have given rise to a refund obligation and its sharing obligation for that year would likewise have been lower.

By failing to meet its statutory obligation, the Commission caused U S WEST to have increased sharing for 1996. Now to require U S WEST to implement refunds of the same amounts essentially to the same customers would prejudice U S WEST. That is precisely what Kelly,<sup>13</sup> Baumgardner<sup>14</sup> and the other cases cited

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<sup>12</sup> Opposition at 9-10.

<sup>13</sup> Kelly v. Secretary, U.S. Dept. of Housing, 97 F.3d 118 (6th Cir. 1996); Kelly v. Secretary, HUD, 3 F.3d 951 (6th Cir. 1993).

<sup>14</sup> Baumgardner v. Secretary, HUD on Behalf of Holley, 960 F.2d 572 (6th Cir. 1992).

by U S WEST<sup>15</sup> condemn.<sup>16</sup>

AT&T has provided no valid reason to deny U S WEST's Application. That Application demonstrates that requiring a refund will force U S WEST to refund the same amounts to the same customers twice. Nothing in AT&T's Opposition refutes that fundamental fact. The Commission should reverse the Refund Order and allow U S WEST to offset its refund liability to reflect the amounts it has already returned to customers via sharing. In the alternative, because of its failure to complete its investigation in the time prescribed by the Act, the Commission must allow U S WEST to offset its 1996 refund liability to reflect its sharing refund for that year.

Respectfully submitted,

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August 27, 1997

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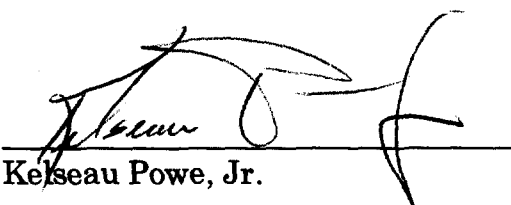
<sup>15</sup> Application at 11, n. 26.

<sup>16</sup> AT&T makes the curious claim that this argument represents U S WEST's "apparent acknowledgment that there is no legal basis for challenging the Bureau's decision." (Opposition at 9.) Lest there be any mistake, this argument is very much a "legal basis" for reversing the Refund Order.



## **CERTIFICATE OF SERVICE**

I, Kelseau Powe, Jr., do hereby certify that on this 27th day of August 1997, I have caused a copy of the foregoing **REPLY OF U S WEST COMMUNICATIONS, INC. TO OPPOSITION TO APPLICATION FOR REVIEW** to be served via first-class United States Mail, postage-prepaid, upon the persons listed on the attached service list.



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